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A New Role for Tortious Interference in the Digital Age: A Model to Enforce End User License Agreements

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A NEW ROLE FOR TORTIOUS INTERFERENCE IN THE DIGITAL AGE: A MODEL TO ENFORCE END USER LICENSE AGREEMENTS

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A NEW ROLE FOR TORTIOUS INTERFERENCE IN THE DIGITAL AGE: A MODEL TO ENFORCE END USER LICENSE AGREEMENTS

JESSICA GALLEGOS*

ABSTRACT

This Note examines tortious interference, provides an overview of its controversial history and scholarly critiques, and evaluates new uses for tortious interference in the digital age. Through an overview of recent case law from the unlikely field of copyright law, this Note uncovers a new phenomenon in the law: parties to copyright litigation are using tortious interference as a model to enforce end user license agreements. This is both genius and problematic. It is genius on the part of those bringing breach of end user license agreement claims because tortious interference grants companies a remedy at law when third parties induce end users to breach their end user agreement. In the digital age, it provides a solution to companies faced with a reluctance to endure enormous litigation costs and public relations nightmares that accompany direct suits against potentially thousands of end user consumers of their products.¹ However, the solution of tortious interference is also problematic in the digital age: it creates an incentive for companies to write end user agreements without ever intending to enforce the terms against the end users themselves. Instead, these companies intend to enforce the terms against their competition. This is extremely questionable because it usurps the underlying philosophies of both tortious interference and contract law. Ultimately, this Note suggests that tortious interference should be affirmed as a new model to enforce end user license agreements. However, this Note also suggests limiting this new model's negative implications with a burden-shifting misuse doctrine, which preserves the heroic attributes of tortious interference and limits it to protect the integrity of contract law.

I. INTRODUCTION.....	412
II. BACKGROUND OF TORTIOUS INTERFERENCE.....	414
A. The History of Tortious Interference	414
B. The Great Expansion of Tortious Interference	415
C. Critiques of Tortious Interference	417
III. A NEW USE FOR TORTIOUS INTERFERENCE: A MODEL TO ENFORCE END USER LICENSE AGREEMENTS.....	419
A. Background of Digital Millennium Copyright Act and End User License Agreements	419
B. MDY Industries, LLC v. Blizzard Entertainment, Inc.....	421
C. Static Control Components, Inc. v. Lexmark International, Inc.	424

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1. "In the mass market, licenses are usually 'enforced' by the good will of the end user, not by litigation. The cost of enforcing contracts in a court of law with multiple individuals would be prohibitive in most cases." Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing For Software*, 12 GEO. MASON L. REV. 687, 696 n.50 (2004). The Napster and YouTube phenomena exemplify copyright owners' reluctance to sue end users. See Nate Anderson, *Viacom's Top Lawyer: Suing P2P Users "Felt Like Terrorism,"* ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2009/11/viacoms-top-lawyer-suing-p2p-users-felt-like-terrorism.ars> (Viacom general counsel explains that suing end users is "expensive, and it's painful, and it feels like bullying.").

IV. IMPLICATIONS OF TORTIOUS INTERFERENCE AS A MODEL TO ENFORCE END USER LICENSE AGREEMENTS AND A PROPOSED MISUSE DOCTRINE.....	426
A. <i>Implications of the End User Cases</i>	426
B. <i>Implications of Tortious Interference as a Model to Enforce End User License Agreements</i>	428
C. <i>A Proposed Misuse Doctrine</i>	429
1. <i>Defendant's Proof of Lack of "But For" Causation Triggers Presumption of Misuse</i>	429
2. <i>Rebutting the Presumption: "Specific Targeting and Soliciting" and "No Other Use"</i>	429
D. <i>Application of the Proposed Misuse Doctrine</i>	430
1. <i>As Applied to MDY Industries, Inc.</i>	430
2. <i>As Applied to Lexmark</i>	431
3. <i>Potentially Problematic End User License Agreements</i>	431
E. <i>Implications of the Proposed Misuse Doctrine</i>	433
VI. CONCLUSION	433

I. INTRODUCTION

Copyright owners attempt to control end users² through copyright and contract law. This is nothing new. Traditional copyright law seeks to limit copyright owners' control of and allow public access to copyrighted works. One such limit allows public access to copyrighted works when copyright terms expire. The recent enactment of the Digital Millennium Copyright Act (DMCA)'s Anticircumvention Rule³ expanded copyright owners' power to protect their digital property in the internet age by permitting them to rewrite and expand traditional copyright limits. Copyright owners subsequently used their newly acquired DMCA power to limit end users' use of copyrighted products through end user agreements and DMCA preventative mechanisms. Because of the immense amount of power that it afforded copyright owners, many scholars advocate rewriting the DMCA text to limit that power.⁴ Contract law provides another avenue for copyright owners to expand public use of copyrighted works through end user license agreements (EULAs). To address this alternate avenue, some advocate a DMCA misuse doctrine that bars copyright infringement claims when copyright owners expand their power beyond traditional copyright limits through EULAs.⁵

This Note demonstrates that such solutions address only half of the problem: they leave tortious interference with a contract as another tool with which companies can control end users and their

2. For the purposes of this Note, "end user" refers to consumers who ultimately buy and use a copyrighted product.

3. See discussion *infra* Section III.A.

4. See generally Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 499-500 (2004) (arguing that click-wrap and shrink-wrap licenses chill speech about products, suppress competition, and allow copyright owners to contract around copyright law).

5. *Id.* at 501.

competition. The recent cases of *MDY Industries, LLC v. Blizzard Entertainment, Inc.*⁶ and *Static Control Components, Inc. v. Lexmark International, Inc.*⁷ illustrate a pattern of companies' attempts to control end users through both the DMCA and tortious interference. Thus, even if critics convince Congress to limit the DMCA's Anticircumvention Rule or to create a DMCA misuse doctrine, tortious interference provides yet another model for companies to control end users by suing third-party competitors when end users breach end user agreements.

This is a new use for tortious interference. An examination of tortious interference's history and an analysis of relevant cases reveal that using tortious interference as a model to enforce EULAs is necessary in some cases and problematic in others. Tortious interference serves a new, legitimate role because of the litigation costs involved in suing potentially thousands of end users and the public relations concerns in the digital age.⁸ It grants companies a remedy at law when third parties induce end users to breach their end user agreements. However, companies can also misuse tortious interference when writing their end user agreements when they do so without the intention of enforcing them except against their competitors. Ultimately, this Note suggests that tortious interference should be affirmed as a new model to enforce EULAs. However, this Note also advocates a misuse doctrine to limit this new model's negative implications.

In Section II, this Note generally discusses the historical background and critiques of tortious interference. In Section III, this Note presents the cases of *MDY Industries, LLC v. Blizzard Entertainment, Inc.* and *Static Control Components, Inc. v. Lexmark International, Inc.*, where companies used DMCA claims and tortious interference with end user agreement claims against competitors to control the use of their copyrighted products. Section IV discusses the positive and negative implications of this new use of tortious interference to enforce end user agreements. This Note responds by proposing a misuse doctrine that attempts to preserve the positive implications and limit the negative implications of this new use. Finally, Section V invites others to test this misuse theory on the broader scale of tortious interference, generally.

6. 616 F. Supp. 2d 958 (D. Ariz. 2009); *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-2555-PHX-DCG, 2008 WL 2757357 (D. Ariz. July 14, 2008).

7. 615 F. Supp. 2d 575 (E.D. Ky. 2009).

8. "In the mass market, licenses are usually 'enforced' by the good will of the end user, not by litigation. The cost of enforcing contracts in a court of law with multiple individuals would be prohibitive in most cases." Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing For Software*, 12 GEO. MASON L. REV. 687, 696 n.50 (2004). The Napster and YouTube phenomena exemplify copyright owners' reluctance to sue end users. See *supra* note 1.

II. BACKGROUND OF TORTIOUS INTERFERENCE

This Note argues that the digital age provided another opportunity to expand the application of tortious interference to enforce end user agreements. The history and expansion of tortious interference provides a backdrop necessary to truly appreciate the benefits of and problems associated with the new model. The claim's property and anticompetition policy roots confirm that using tortious interference as a means to protect intellectual property interests through EULAs is extremely faithful to the history of tortious interference. The great expansion of tortious interference from those humble beginnings also foreshadows the potential for misuse by copyright owners as discussed later in the Note.

A. *The History of Tortious Interference*

Tortious interference began as tool to protect Roman and English property interests in their servants before it morphed into a full-blown cause of action.⁹ Before its official recognition, courts began applying the emerging cause of action to further anticompetition policies during labor shortages.¹⁰ The Queen's Bench officially recognized the first tortious interference cause of action when it held theater owner Gye liable for inducing opera singer Johanna Wagner to breach her contract with another theater owner named Lumley.¹¹ Apparently the court reasoned that the historical property interest created between a master and servant was sufficiently similar to the property interest created between freely contracting parties who enter a contract for personal services. Inducing Wagner to breach her contract constituted malicious interference with Lumley's property

9. W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 129, at 979-80 (5th ed. 1984); Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 664-65 (1923) (citing the Ordinance of Labourers, 23 EDW. III (1349)); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1513-15 (1980) (discussing that business tort was not recognized until the nineteenth century).

10. Sayre, *supra* note 9, at 665-66; see also Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 285 (1994).

11. As early as the fourteenth century, the application of tortious interference where competition interfered with one's potential or current customers was recognized; however, tortious interference was not actionable until the nineteenth century. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 716 (Tex. 2001); ABA SECTION OF ANTITRUST LAW, BUSINESS TORTS AND UNFAIR COMPETITION HANDBOOK 106 n.11 (2d ed. 2006) [hereinafter ABA HANDBOOK]; *Tortious Interference with Contractual Relationship in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, *supra* note 9, at 1522; cf. Frederick H. Cooke, *A Proposed New Definition of a Tort*, 12 HARV. L. REV. 335, 339 (1898) (addressing whether the liability for inducing breach should arise when it is a natural outgrowth of competition).

interest in that contract and triggered tort liability.¹² The *Lumley* court established liability in “all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act.”¹³ This holding left open the door for expansion of the rule in contexts beyond the master/servant relationship; in fact, the holding explicitly defined master/servant relationships as including contractual relationships.¹⁴

B. The Great Expansion of Tortious Interference

Since the court first applied tortious interference in *Lumley v. Gye*, the cause of action has expanded rapidly and in many directions. Courts have applied tortious interference to many contexts: interference with prospective business relationships,¹⁵ merely advising a party to breach,¹⁶ franchise contexts, labor-law disputes (indeed, it is the foundation for strike law),¹⁷ antitrust disputes,¹⁸ interference with advertising,¹⁹ and interference with the expectation of inheritance.²⁰ Juries have also awarded plaintiffs massive punitive damages for tortious interference claims.²¹ One commentator has even suggested that it should be applied to interference with the expectation of a gift.²²

The tort’s standard of liability and elements varies greatly from jurisdiction to jurisdiction.²³ Most courts attempt to use the *Restate-*

12. *Lumley v. Gye*, [1853] 118 Eng. Rep. 749 (Q.B.) 754; *see also* Sayre, *supra* note 9, at 667-68.

13. *Lumley*, [1853] 118 Eng. Rep. at 754.

14. The *Lumley* court held that liability extends to the master/servant relationship, which includes situations “where a party has contracted to give his personal services for a certain time to another.” *Id.* at 755.

15. *Temperton v. Russel*, [1893] 1 Eng. Rep.(Q.B.) 715, 715.

16. *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020, 1022 (7th Cir. 1999).

17. David Howarth, *Against Lumley v. Gye*, 68 MOD. L. REV. 195, 209 (2005). Tortious interference claims relating to both labor-law and antitrust disputes are now largely subject to preemption. Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 62 n.4 (1980).

18. Perlman, *supra* note 17, at 62 n.4.

19. *Penthouse Int’l, Ltd. v. Koch*, 599 F. Supp. 1338, 1340 (S.D.N.Y. 1984); *Daisy Outdoor Adver. Co. v. Abbott*, 473 S.E.2d 47, 48-49 (S.C. 1996); *see also* Chhina Family P’ship, L.P. v. S-K Grp. of Motels, Inc., 622 S.E.2d 40, 45 (Ga. Ct. App. 2005).

20. *Bohannon v. Wachovia Bank & Trust Co.*, 188 S.E. 390, 391 (N.C. 1936); *Harmon v. Harmon*, 404 A.2d 1020, 1021-22 (Me. 1979).

21. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 4 (1987) (awarding Pennzoil \$3 billion in punitive damages).

22. Note, *Intentional Interference with the Expectation of a Gift*, 48 HARV. L. REV. 984, 984 (1935).

23. Derek G. Howard & Mary B. Cranston, *The Interference Torts*, in BUSINESS TORTS & UNFAIR COMPETITION: A PRACTITIONER’S HANDBOOK 95, 99 (A. Michael Ferrill ed., 1996); *see* Wexler, *supra* note 10, at 291-92. This can also be deduced from a mere scanning of cases, law review articles, handbooks, and jury instructions which cite to the RESTATEMENT (SECOND) OF TORTS § 767 (1979).

ment's standard of liability because, despite the *Restatement's* vague requirements, it remains one of the most straightforward articulations of the doctrine.²⁴ The *Restatement* requires five elements to prove tortious interference liability: (1) a valid contract (or prospective contractual relations),²⁵ (2) knowledge of the contract by the interfering party, (3) intentional and improper inducement to breach the contract,²⁶ (4) actual breach, and (5) damages.²⁷ In response to practice-oriented and academic confusion as to what "improper" means, the *Restatement* provides seven factors to determine if an improper act exists:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.²⁸

Courts tend to apply these factors against the interests of the allegedly interfering party because, when balancing the interests of society (preserving their "security of transaction"), the contracting party (preserving her freedom to contract) and the interfering party (preserving her freedom to act, compete, and create),²⁹ the interfering party will almost always lose. When an interfering party is a competitor, both the *Restatement of Torts* and the *Restatement of Unfair Competition* hold that a contracting party's interest in a secure marketplace typically trumps the conflicting interests of the interfering

24. Howard & Cranston, *supra* note 23, at 98-99.

25. So long as the contract is not otherwise void by public policy, tortious interference liability will be found. See KEETON ET AL., *supra* note 9, at 994. Voidable contracts may be the basis for a tortious interference claim. RESTATEMENT (SECOND) OF TORTS §766 cmt. f (1979). Some courts do not find liability for tortious interference with an at-will contract, reasoning that at-will contracts do not guarantee performance. See Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp., 312 F. Supp. 2d 379, 404 (E.D.N.Y. 2004); Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 449 n.4 (N.Y. 1980); ABA HANDBOOK, *supra* note 11, at 118.

26. Initially, courts required malice to attribute tortious interference liability to a defendant, but failed to adequately define malice. To clear up the confusion around the malice standard of liability, the *Restatement* changed the malice standard to "improper," attributing liability to a third party "who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." RESTATEMENT (SECOND) OF TORTS § 766 (1979).

27. Howard & Cranston, *supra* note 23, at 99.

28. RESTATEMENT (SECOND) OF TORTS § 767 (1979).

29. Howard & Cranston, *supra* note 23, at 107; RESTATEMENT (SECOND) OF TORTS § 767 (1979).

party's right to compete—and thus reject competition as a defense in favor of a secure marketplace,³⁰ balancing the interests heavily against the interfering party.³¹ Where a contract exists, the drafters of the *Restatements* prefer contractual stability, resulting in deference to the plaintiff as he asserts the elements of his tortious interference claim.

Where the plaintiff successfully asserts all elements of a tortious interference claim, the defendant may respond with a privilege to interfere. A privilege is essentially a party's assertion that the context or circumstances surrounding the alleged interference render the conduct appropriate.³² But even searching for a privilege will not save a competitor. Lawful competition is not a privilege for tortious interference where an actual contract exists.³³

C. Critiques of Tortious Interference

Advocates defend tortious interference as a safety valve of contract law by providing a remedy where contract law should but fails. For instance, tortious interference serves to remedy the perceived inadequacy of contract law damages, which usually do not avail plaintiffs damages when the breaching party is insolvent,³⁴ when the plaintiff cannot sue its many breaching end users due to the cost and bad taste of litigation, or in most cases where the plaintiff seeks litigation expenses or emotional or punitive damages.³⁵ It also protects the institution of contractual relationships by deterring behavior that leads to breach, thus preserving relational integrity between parties³⁶ and the moral basis of contract law.³⁷

30. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995); see RESTATEMENT (SECOND) OF TORTS § 767 (1979).

31. See RESTATEMENT (SECOND) OF TORTS § 767(d); see also Howard & Cranston, *supra* note 23, at 112-13.

32. Howard & Cranston, *supra* note 23, at 107; Perlman, *supra* note 17, at 91-93; ABA HANDBOOK, *supra* note 11, at 108.

33. Where there are only prospective economic relations (no contract), tort law allows competition as a privilege against liability so long as the interfering party used lawful means to vie for potential customers *and* was not motivated by subjective desire to harm his or her competitor. Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1100 (1993) (arguing that tortious interference liability may “chill legitimate business practices”).

34. Wexler, *supra* note 10, at 305.

35. Contract law rarely awards punitive damages. See generally William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999).

36. William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1176 (1996).

37. If a promise between two parties places a moral duty on a third party to refrain from interfering, and breaching a contract is also considered an immoral act, then the interfering party and the breaching party have acted equally immorally: both breach moral duties to refrain from obstructing the performance of a promise.

Further, tortious interference provides a method for allocating risk of breach to the least cost avoider.³⁸ Traditional contract law allows parties to allocate risk between each other. Interference by a noncontracting third party upsets the bargained-for equation, including the allocation of risk. Where contracts are necessarily incomplete because they say nothing of liability to third parties, tortious interference steps in to complete the contract when third parties intervene, acting as a default rule. It allocates the liability to the least cost avoider—the interfering party. It creates incentives for contracting parties to sue the interfering party because a tortious interference claim results in a punitive damages award (where a mere contract claim does not). This restores the balance when third parties upset the normal flow of a contract by interfering and allocates harm to the least cost avoider: the tortious interferer.³⁹

Critics of tortious interference endorse the limitation or altogether elimination of tortious interference because of its perceived inconsistencies with contract law and its vague standard of liability.⁴⁰ Tortious interference is inconsistent in many ways with contract law: it doles out punitive damages on a regular basis,⁴¹ imposes obligations on parties who lack privity to the contract,⁴² and is inconsistent with a Holmesian theory of contract.⁴³ Granting punitive damages arguably gives parties more than the benefit of their bargain⁴⁴ and throws off the cost-benefit analysis in which parties engage when they bargain for their exchange. Tort liability in contract is in and of itself problematic: breach of contract never constitutes a tort unless a “legal duty independent of the contract itself has been violated,”⁴⁵ so it seems inconsistent to attribute tortious liability on a third party for a breach that would never impute tort liability to a contracting party. It also says nothing of efficiency created by tortious interference. To address this, efficient-breach theorists argue that tortiously interfer-

38. Wexler, *supra* note 10, at 316-17 (explaining the theories of Landes and Posner).

39. *Id.*

40. See Woodward, *supra* note 36, at 1127.

41. Granting punitive damages arguably gives parties more than the benefit of their bargain. Wexler, *supra* note 10, at 294-95.

42. See Howarth, *supra* note 17, at 195 (arguing that “contract law is optional” and should not typically impose “obligations on unwilling parties”).

43. J. Oliver Wendell Holmes sees nothing moral about contract law—for to breach a contract is simply to invoke a right to breach; a contract is merely a legally enforceable promise that gives parties a choice between keeping the promise or paying a compensatory sum of damages. JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 1 (9th ed. 2008). If Holmes is right, then there is no moral problem with inducing someone to breach a contract, for you are merely helping her exercise a right.

44. Wexler, *supra* note 10, at 293-95.

45. 44B AM. JUR. 2D *Interference* § 1 (2010).

ing parties should be rewarded, not punished, when their interference fosters efficient breaches.⁴⁶

The largest area of critique characterizes tortious interference as a “broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way.”⁴⁷ Scholars critique the *Restatement’s* improper standard as vague: “[t]he problem with the interference tort lies in the complete absence of any principle that will explain to us what judgments to make” and when to impose liability.⁴⁸ Critics argue that courts apply the cause of action too broadly on an ad hoc basis, with no clear and consistent standard of liability across jurisdictions.⁴⁹

III. A NEW USE FOR TORTIOUS INTERFERENCE: A MODEL TO ENFORCE END USER LICENSE AGREEMENTS

A. *Background of Digital Millennium Copyright Act and End User License Agreements*

In the digital age, the DMCA and contract law provide opportunities for copyright holders to avoid traditional copyright limitations and to control their end users and their competition. Copyright owners exploit one such opportunity by using a preventative mechanism in the form of digital code to prevent access to their copyrighted digital work. When anyone circumvents that preventative mechanism, the DMCA creates a cause of action for the copyright owner against the circumventer. Copyright owners can potentially misuse this DMCA Anticircumvention Rule by placing preventative mechanisms on noncopyrighted works thus expanding his control over his work,

46. The existence of tortious interference as an available cause of action may also deter efficient breach because it complicates the usual contract incentives for performance and breach. Many Efficient-Breach theorists posit that tortious interference necessarily conflicts with efficiency and therefore generates undesirable outcomes by (1) discouraging efficient breaches (because it imposes a tort incentive to refrain from intervening instead of a contract efficiency incentive that might require intervention when breach is more efficient than performance); or (2) encouraging too many breaches, even when it may be inefficient to do so (because it adds a second potential defendant upon breach, the contracting party may be more apt to breach because the nonbreaching party may sue the tortious interfering party instead of her). Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877, 930 (1990); see Woodward, *supra* note 36, at 1139.

47. KEETON ET AL., *supra* note 9, § 129, at 979.

48. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 346 (1981).

49. One attempt to redefine the standard of liability is Perlman’s Unlawful Means Test, which makes liability available only where the interfering party used unlawful means to interfere. Perlman, *supra* note 17, *passim*. Another attempt is Dowling’s Expansion of Unlawful Means, which makes liability available only in cases of interference where the plaintiff has no other remedy and the interfering party used unlawful means to interfere. Donald C. Dowling Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 513-18 (1986).

services, and products. This, in turn, enlarges copyright owner control over consumers and end users beyond what the drafters of traditional copyright law intended. In response, critics in droves suggest that the legislature should revise areas of the DMCA to better match traditional copyright law.⁵⁰

Copyright owners also employ contract law to expand their rights to control copyrighted work beyond traditional boundaries. By writing limits of use in end user license agreements upon the sale of copyrighted works to consumers, copyright owners expressly limit access to copyrighted material by both end users and competitors.⁵¹ These agreements often take the form of shrink-wrap and click-wrap agreements. Shrink-wrap agreements derive their name from the shrink-wrap packaging around software. Inside the package are license agreements, many times drafted by the copyright owners and enforceable at law as a contract. When the consumer opens the “shrink-wrapped” product, “the user assents to the software terms enclosed within.”⁵² Click-wrap agreements are the digital equivalent of shrink-wrap agreements, but the consumer “clicks” on the digital product to assent to software terms.⁵³

While most courts uphold shrink-wrap and click-wrap user agreements as enforceable contracts, many academics seek to limit their enforceability.⁵⁴ Users rarely read or understand the terms of click-wrap and shrink-wrap agreements and they afford an enormous amount of power to copyright owners. Shrink-wrap and click-wrap agreements constitute offer and acceptance upon the unilateral offer and subsequent keeping of the product by the end user, which implies the end user’s consent to the end user agreement terms.⁵⁵ Because end users rarely read the terms, critics argue these agreements

50. See, e.g., Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1136 (2003); see also G. Gervaise Davis III, *The Affirmative Defense of Copyright Misuse and Efforts to Establish Trademark Misuse, and Fraud on the Copyright Office*, at 360-61 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. 19139, 2009).

51. Copyright owners relegate their rights through “ubiquitous clickwrap and browwrap licensing.” Loren, *supra* note 4, at 495; see also Elizabeth M.N. Morris, *Will Shrinkwrap Suffocate Fair Use?*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 237, 266 (2007).

52. Richard G. Kunkel, *Recent Developments in Shrinkwrap, Clickwrap and Browwrap Licenses in the United States*, 9 MURDOCH U. ELEC. J. L. 3 (2002), <http://www.murdoch.edu.au/elaw/issues/v9n3/kunkel93.html>.

53. *Id.* at ¶ 38.

54. See generally Loren, *supra* note 4, at 508-12 (arguing that unconscionability, deeming contracts void as against public policy, and preemption of EULAs by copyright law generally fail to combat potential misuses of click-wrap and shrink-wrap EULAs).

55. Lothar Determann & Aaron Xavier Fellmeth, *Don’t Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and the European Community*, 36 U.S.F. L. REV. 1, 18 (2002).

lack mutuality.⁵⁶ These end user agreements place enormous power in the hands of companies.⁵⁷

With the knowledge that end users rarely read the agreements and that courts will enforce the terms, copyright owners draft end user agreements to include terms that benefit the copyright owner and control the use of their products.⁵⁸ Companies use EULAs to prevent end users from benchmark testing or reverse engineering their products, to regulate the resale of their products, and even to prohibit end users from review or criticism of their products or the companies themselves.⁵⁹ As soon as courts began enforcing the terms of shrink-wrap and click-wrap agreements, companies recognized tortious interference as a second model (beyond traditional breach of contract actions) to enforce those agreements. This is illustrated by the *MDY Industries, LLC* and *Lexmark, Inc.* cases.

These cases also reveal the positive and negative implications of tortious interference as a model to enforce EULAs. First, even if DMCA critics convince Congress to limit the DMCA's Anticircumvention Rule to prevent use of the DMCA or contract to expand copyright terms beyond traditional copyright law through EULAs, copyright owners can continue to enforce shrink-wrap and click-wrap EULAs through tortious interference to control end users and competition. This is great because tortious interference benefits copyright owners and other companies where it is close to impossible to attain damages from end users through a direct breach of contract action.⁶⁰ But, it also gives rise to potential misuse by companies who draft terms with no intent of ever enforcing them against the contracting party—and only intend to enforce the terms against competition.

B. MDY Industries, LLC v. Blizzard Entertainment, Inc.

Blizzard Entertainment, Inc. created World of Warcraft (WoW), the “largest and most successful multiplayer online game in the world,”⁶¹ that allows many players to interact with each other through “avatars,” live in-game interaction, and voice-chat, as if they are all in the same room, though they may be continents apart in reality.⁶² One of the three main goals in WoW is to enjoy the social,

56. *Id.*

57. Loren, *supra* note 4, at 496-98.

58. *Id.*

59. *Id.* at 497.

60. *See id.* at 496-97 (discussing the increased use of click-wrap and shrink-wrap agreements because of increased ability for copyright owners to control copyrighted material).

61. MDY Indus., LLC v. Blizzard Entm't, Inc., 616 F. Supp. 2d 958, 962 (D. Ariz. 2009).

62. Plaintiff MDY Industries, LLC, and Third Party Defendant Michael Donnelly's Statement of Facts in Support of Their Motion for Summary Judgment at 2, *MDY Indus.*, 616 F. Supp. 2d 958 (No. CV06-02555-PHX-DGC).

role-playing feature of the game.⁶³ In addition to buying the game itself, a WoW end user must also subscribe to an online account for a monthly fee.⁶⁴ She must also agree to the terms of Blizzard's EULA and terms of use agreement, which allow her to install the software onto her computer(s) and make one "archival"⁶⁵ compact disc copy of the game. When the end user launches WoW to access WoW game servers, she makes a copy of WoW on her computer's Random Access Memory (RAM).⁶⁶

The terms also prohibit the end user from creating or using "bots . . . or any other third-party software designed to modify the World of Warcraft experience."⁶⁷ A bot (short for "software robot")⁶⁸ is a program enabling users to play WoW on "auto-pilot," which allegedly results in a direct loss of WoW's income because it causes user dissatisfaction by destroying the live aspect and fair competition in the game.⁶⁹ To enforce the EULAs, Blizzard monitors the end user's computer RAM with a program called "Warden" to detect the use of a third party program enabling the use of bots.⁷⁰ Upon such detection, the license agreement gives Blizzard grounds to cancel the end user's account.⁷¹

Michael Donnelly, doing business as MDY Industries, Inc., created and subsequently sold the program "Glider" to WoW users.⁷² Glider is a bot that plays WoW on autopilot while users are away from their

63. Blizzard Entm't, Inc. and Vivendi Games, Inc. Statement of Facts in Support of Their Motion for Summary Judgment at 5, *MDY Indus.*, 616 F. Supp. 2d 958 (No. CV06-02555-PHX-DGC).

64. Plaintiff & Third Party Defendant's Statement of Facts, *supra* note 62, at 2.

65. *Id.* at 3.

66. Blizzard & Vivendi's Statement of Facts, *supra* note 63, at 10.

67. Plaintiff & Third Party Defendant's Statement of Facts, *supra* note 62, at 19.

68. Blizzard & Vivendi's Statement of Facts, *supra* note 63, at 10.

69. *Id.* at 11-13 ("[B]ots can play much longer than a human without stopping."). Bots harm WoW because they cause a loss of revenue resulting from (1) a loss in monthly fees—bots can advance faster through the use of automated play, shortening the life of the game, and in turn, reducing life of monthly payments to WoW, (2) a loss of WoW users—bots destroy the integrity of the game, in that other users now play against bots (who have a perceived unfair advantage of jumping levels and gain WoW wealth at unequal rates) instead of live players, and (3) employee time spent dealing with user complaints about bots and detecting the bots. *Id.* at 11, 15. From December 22, 2004 to March 18, 2008, Blizzard received over 465,000 user grievances against bots. *Id.* at 15.

70. Plaintiff & Third Party Defendant's Statement of Facts, *supra* note 62, at 7; Blizzard and Vivendi's Statement of Facts, *supra* note 63, at 20-22.

71. See Plaintiff & Third Party Defendant's Statement of Facts, *supra* note 62 at 7; Blizzard & Vivendi's Statement of Facts, *supra* note 63, at 20-22.

72. Glider is also known as "WoWGlider" and "MMOglider." Blizzard and Vivendi's Statement of Facts, *supra* note 63 at 3, 22; Benjamin Duranske, *MDY Industries v. Blizzard: Preliminary Filings Complete; Protective Order Entered*, VIRTUALLY BLIND (Sept. 6, 2007), <http://virtuallyblind.com/2007/09/06/mdy-v-blizzard-summary-and-update-preliminary-filings-complete-protective-order-entered/>.

computers and purposefully circumvents Warden's detection.⁷³ On MDY Industries' Glider website, a message warns WoW customers that using Glider constituted a breach of Blizzard's end user agreement.⁷⁴

Instead of suing its end user consumers, Blizzard Entertainment sued MDY Industries under the DMCA's Anticircumvention Rule⁷⁵ and tortious interference. The United States District Court of Arizona held that when an end user logs on to play WoW and accesses WoW game servers, she makes an unauthorized copy of WoW on her computer's RAM because authorized use bans the user from bot software. The court found MDY Industries liable on both counts.⁷⁶ Even if Congress altered the DMCA, Blizzard Entertainment would still win on the tortious interference claim.⁷⁷

The court reasoned that (1) Blizzard Entertainment's user agreements constitute valid contractual relationships; (2) that Donnelly, doing business as MDY Industries, knew of the user agreements because he agreed to one himself as a WoW user; (3) MDY Industries intentionally and improperly interfered with and caused a breach of the end user agreement; and (4) Blizzard suffered damages because the bots destroyed the live aspect of the game, and customers left or would leave as a result.⁷⁸ To determine the third prong of whether Donnelly acted improperly, in an earlier order addressing a motion for summary judgment the court used the *Restatement's* seven factors, granting most weight to the following: (1) MDY Industries knowingly assisted the breach of valid contracts between users and Blizzard Entertainment; (2) MDY Industries intentionally avoided detection of that interference, thereby placing Blizzard at risk; and (3) MDY Industries was motivated by financial gain.⁷⁹ Minimizing MDY Industries' interests, the court explained that the success of its crea-

73. Plaintiff & Third Party Defendant's Statement of Facts, *supra* note 62, at 9-11. Blizzard & Vivendi's Statement of Facts, *supra* note 63, at 12.

74. Blizzard & Vivendi's Statement of Facts, *supra* note 63, at 33.

75. The court reasoned that (1) "WoW has a valid copyright in the dynamic, nonliteral components of the game"; (2) access to those elements is controlled by Warden, the technological measures Blizzard designed to effectively control access to its copyrighted game WoW, which Glider circumvents; (3)/(4) Glider gives users unauthorized access to WoW, in that the user need not be screened by Warden; (5) once users gain this unauthorized access, they can copy the elements as they are displayed (onto the user computer's RAM); and (6) Glider is specifically designed and marketed to circumvent Warden. MDY Indus., LLC v. Blizzard Entm't, Inc., 616 F. Supp. 2d 958, 967-68 (D. Ariz. 2009) (holding that MDY Industries violated 17 U.S.C. § 1201(a)(2) (2006)). Warden monitors user access only with respect to the nonliteral, user-interface component of the game, as opposed to the literal code of the game, which Warden is not designed to monitor. *Id.* at 966-67. Thus, Glider only circumvents Warden's monitoring of nonliteral aspects of the game. *Id.*

76. MDY Indus., LLC v. Blizzard Entm't, Inc., 616 F. Supp. 2d 958, 971, 973. (D. Ariz. 2009).

77. *See id.* at 970-71.

78. *Id.*

79. MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DCG, 2008 WL 2757357, at *15-16 (D. Ariz. July 14, 2008).

tive innovation interest literally depended on the success of WoW and implied that MDY Industries' actions were exploitative,⁸⁰ parasitic, and not competitive.⁸¹

C. Static Control Components, Inc. v. Lexmark International, Inc.⁸²

Lexmark, a manufacturer of printers and printer accessories, includes a patented chip in every Lexmark ink cartridge that matches a mirror chip in every Lexmark printer such that end users of Lexmark printers cannot use any other manufacturer's ink cartridge with a Lexmark printer.⁸³ The court refers to this mechanism as "handshake" technology because the chip in the Lexmark cartridge must "shake hands" with the chip in the Lexmark printer to work.⁸⁴ Lexmark also placed a DMCA-type preventative mechanism in the printer software to prevent others from obtaining access to handshake technology.⁸⁵ Lexmark sells its customers two types of cartridges: discounted cartridges that come with a prebate agreement on the shrink-wrap package and full-price cartridges with no such agreement.⁸⁶ The prebate terms restrict the end user from using the cartridges more than one time, and after that initial use, the terms bind the end user to return the cartridge to Lexmark for "remanufacturing and recycling."⁸⁷

A company called Static Control provides printer-related services to the end users of many printer brands,⁸⁸ and sells microchips to third-party companies for use in remanufactured toner cartridges.⁸⁹ This chip enables Lexmark printer users to purchase and use Static Control ink cartridges in Lexmark printers.⁹⁰ Lexmark filed copyright infringement and tortious interference claims⁹¹ arguing that

80. *Id.* at 16.

81. *Id.*

82. Discussion of this case is based off of two different orders. In one ruling, the circuit court ruled on the DMCA cause of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 545-53 (6th Cir. 2004). In a separate ruling, the district court ruled that the prebate agreement constituted a contract for the purposes of tortious interference by denying Static Control's motion for partial summary judgment that there are no prebate or return "[c]ontracts" "[b]ecause Lexmark [c]annot [s]how any [m]eeting of the [m]inds." *See Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 487 F. Supp. 2d 830, 860 (E.D. Ky. 2007).

83. *Lexmark Int'l, Inc.*, 387 F.3d at 530.

84. *Id.*

85. Lexmark claimed that the code was a "checksum" device that acted as a security system and therefore constituted an anticircumvention device. *Id.* at 531. The court disagreed. *Id.*

86. *Static Control Components, Inc.*, 487 F. Supp. 2d at 836.

87. *Id.*

88. *See Static Control Components*, <http://www.scc-inc.com/> (last visited Mar. 18, 2011).

89. *Lexmark Int'l, Inc.*, 387 F.3d at 529.

90. *Id.* at 550.

91. Lexmark filed "claims for intentional interference with contractual relations, intentional interference with prospective economic advantage, and civil conspiracy." *Static*

Static Control had to tamper with Lexmark's DMCA anticircumvention handshake code to obtain the handshake software. Lexmark also argued that its prebate agreement constituted a contract between Lexmark and Lexmark end users, thus Static Control tortiously interfered with Lexmark's EULA.⁹²

The United States District Court for the Eastern District of Kentucky struck down the DMCA claim. The court found that Lexmark's preventative mechanism did not sufficiently control access to the printer's handshake software code because anyone who purchased a Lexmark printer could read the copyrighted code from a Lexmark printer's memory. The postsale reuse restriction on the cartridge was unenforceable under the first-sale doctrine.⁹³

Although the tortious interference claim is currently pending appeal, the district court upheld Lexmark's prebate EULA as a valid contract⁹⁴ despite Static Control's arguments that the prebate agreement lacked mutuality because it denied customers the opportunity to agree to the terms and conditions of the prebate contract.⁹⁵ The district court analogized the preterms to shrink-wrap licenses that take effect when the customer unwraps the package (when he can read and agree to those terms).⁹⁶ If the *Lexmark* court follows the MDY court's reasoning—and the current standard of liability for tortious interference—it will likely hold Static Control liable for tortious interference. Lexmark's EULA constitutes a valid contractual relationship. Static Control likely knew of the prebate EULAs. Using the seven *Restatement* factors, the court will likely hold Static Control's knowledge of the prebate terms and motive of financial gain sufficient to prove that Static Control intentionally and improperly interfered with Lexmark's prebate EULA. If Lexmark can prove that it suffered damages because it never received the used cartridges, Lexmark will likely also win a tortious interference claim against Static Control.

Control Components, Inc., 487 F. Supp. 2d at 844.

92. "Lexmark's Return Program provides consumers with discounted prices on cartridges if they agree at the time of purchase to return the empty cartridges to Lexmark." Charles Brewer, *Lexmark's Return Program: Prebate for Inkjet Cartridges*, RECHARGER MAGAZINE, (Dec. 1, 2006), <http://rechargermag.com/articles/2006/12/01/lexmarks-return-program-prebate-for-inkjet-cartridges.aspx>.

93. See *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 615 F. Supp. 2d 575, 588 (E.D. Ky. 2009).

94. *Static Control Components, Inc.*, 487 F. Supp. 2d at 860 (refusing to affirm Static Control's motion for partial summary judgment which argued that Lexmark cannot show any meeting of the minds therefore there are no prebate or return contracts).

95. See *id.* at 844-45.

96. *Id.* at 845.

IV. IMPLICATIONS OF TORTIOUS INTERFERENCE AS A MODEL TO ENFORCE END USER LICENSE AGREEMENTS AND A PROPOSED MISUSE DOCTRINE

A. *Implications of the End User Cases*

The two cases discussed above illustrate two important developments in the doctrine of tortious interference. First, even if critics convince Congress to limit the DMCA's Anticircumvention Rule, tortious interference claims remain available for companies to control end users and expand copyright terms through EULAs. Second, the expansion of tortious interference has both legitimate and problematic implications. Blizzard's legitimate use reveals that tortious interference serves an important role by providing a practical remedy when end users breach the terms of EULAs and contract claims against the end users themselves would be too costly, both financially and politically. However, Lexmark's use of tortious interference corners the cartridge market and suggests the need to limit tortious interference as a model to control end users. Therefore, while tortious interference serves a new, legitimate role granting companies a remedy at law when third parties wrongly assist end users to violate their contractual obligations, the misuse of tortious interference to control competition suggests this new model needs limits.

The difficulty of enforcing WoW EULAs and the fact that gamers could not breach without the help of MDY Industries' Glider program justifies Blizzard's use of tortious interference. Even without the DMCA claim, Blizzard Entertainment's appropriate use of tortious interference allows it to control end user access and use of WoW. In *MDY Industries*, tortious interference serves a valid role by protecting a EULA from interference by a third party. Typical WoW gamers could not breach without the help of MDY Industries. Without MDY Industries' bot program, Glider, WoW gamers have no practical or immediate way to breach the WoW EULA term banning the use of bots. As the court held, the success of MDY Industries' creative innovation interest literally depended on the success of WoW. The court implied that MDY Industries' actions were exploitative and parasitic, instead of innovative and competitive.⁹⁷

Blizzard's EULA establishes grounds on which Blizzard may cancel an end user's account that uses Glider—an unattractive remedy because cancelling the end user's account can lead to that end user no longer paying the monthly WoW fee to play the game. With thousands of WoW end users, litigating each breach would result in enormous costs and bad public relations. Thus, enforcing the terms of

97. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-2555-PHX-DCG, 2008 WL 2757357, at *16 (D. Ariz. July 14, 2008).

their agreement or suing the end users for breach of contract renders Blizzard without a practical contract remedy. Tortious interference provides an alternate remedy by preventing MDY Industries from providing the Glider program that enables end users to use bots and breach the terms of the WoW EULA. The impractical remedy of enforcing WoW EULAs, paired with gamers' inability to breach without the help of MDY Industries' Glider program, justifies Blizzard's use of tortious interference.

In contrast, Lexmark's use of EULAs raises concern that it drafts prebate agreements with the intent to enforce the terms against competition not its users, which is an illegitimate use of tortious interference. As discussed above, Lexmark will likely prevail on its tortious interference claim because the court upheld Lexmark's prebate agreement as a valid contract. Lexmark has two possible motives to bring this claim: one, to get the benefit of the prebate agreement bargains since prebate cartridges were sold at a discounted price and two, to keep competition like Static Control out of the cartridge industry.

While Lexmark has a valid contract claim against the end users, a close look reveals that a tortious interference claim is illegitimate. A successful tortious interference claim would allow Lexmark to indirectly control its end users by preventing Static Control from helping Lexmark end users get a better deal on printer cartridges. Here, the users do not need Static Control's help to breach the prebate agreement. Lexmark printer owners do not need help to fail in returning the cartridge. Lexmark end users can breach without Static Control's interference. Instead of providing an alternate remedy where a third party enables the end users to breach where it is otherwise impractical, tortious interference would allow Lexmark to control its cartridge market.

While it may not be the case here, Lexmark's use of tortious interference illustrates the potential for companies to draft contracts with no intent of ever enforcing the terms against end users, but with the sole intent of enforcing the terms against the competition. As with all third parties to a contract, competitors like Static Control have no bargaining power under the EULA terms and no way to escape a tortious interference claim under the current system.

These claims suggest a new use for tortious interference—a means to control end users. In both cases, the courts upheld the existence of a contract when Lexmark and MDY Industries used shrink-wrap (prebate) and click-wrap EULAs.⁹⁸ Instead of enforcing terms against breaching end users who use bots or fail to return a cartridge to

98. Enormous power is placed in the hands of companies, causing the massive, though so far unsuccessful movement to limit the enforceability of shrink-wrap and click-wrap agreements. *See generally* Loren, *supra* note 4, at 495 n.2 (providing a representative sample of scholarly articles).

Lexmark for “remanufacturing and recycling,”⁹⁹ the companies used tortious interference as a model to enforce the terms against competition. Even if courts strike down DMCA claims, tortious interference grants copyright owners another method to control end users’ access to their copyrighted material. This is problematic in *Lexmark* because Lexmark is trying to monopolize the cartridge market. But, tortious interference is appropriate in *MDY Industries* because it overcomes the difficulty of enforcing WoW EULAs against end users in a context where end users cannot breach without the help of third party MDY Industries.

B. Implications of Tortious Interference as a Model to Enforce End User License Agreements

As discussed in Section III.A., because end users rarely read or understand the terms of click-wrap and shrink-wrap agreements,¹⁰⁰ EULAs place enormous power in the hands of copyright owners to draft terms that regulate the use of their copyrighted works.¹⁰¹ With knowledge that end users rarely read the agreements and that courts will enforce the terms, copyright owners draft EULAs to include a massive amount of terms that benefit the copyright owner and control the use of their products.¹⁰² These cases illustrate that as soon as courts began enforcing the terms of shrink-wrap and click-wrap agreements, companies recognized tortious interference as a second model (beyond traditional breach of contract actions) to enforce agreements. This is both beneficial and problematic.

As seen with *Blizzard*, sometimes the use of a tortious interference claim is the only practical remedy available to contracting parties—especially when used to enforce EULAs—because cost and public relations concerns render impractical the attainment of damages from end users through a direct breach of contract action.¹⁰³ Therefore, courts should not completely eliminate tortious interference as a model to enforce EULAs. It provides a cause of action to companies like Blizzard Entertainment, where there is no practical claim at law in the absence of tortious interference because EULA breach claims are too financially and politically costly.

This use of tortious interference also allows the cause of action to serve its traditionally valid role of providing a stable marketplace by encouraging parties to make contracts, supplementing contract law

99. *Static Control Components, Inc.*, 487 F. Supp. 2d at 836.

100. See Loren, *supra* note 4, at 497; cf. Determann & Fellmeth, *supra* note 55, at 18 (noting that software publishers generally do not require users to expressly confirm acceptance of the terms of the EULA).

101. See Loren, *supra* note 4, at 497.

102. *Id.*

103. See sources cited *supra* note 50.

by availing punitive damages when the breaching party is insolvent, enforcing the morality of promise, and allocating liability to the least-cost avoider of the harm.

However, as seen in Lexmark's use of tortious interference, tortious interference as a model to enforce EULAs gives rise to potential misuse by companies who draft terms of EULAs with no intent of ever enforcing them against the end users, but rather competition, with the goal of suppression. This highlights one of the major problems inherent to imputing liability to a party with no privity to the contract, as discussed in Section II.

C. A Proposed Misuse Doctrine

In response to the potential misuse and benefits of tortious interference as a model to enforce EULAs, this Note suggests a misuse doctrine to prevent companies from enforcing a EULA with tortious interference by drafting their EULA without intent to enforce the agreement against the end user.

1. Defendant's Proof of Lack of "But For" Causation Triggers Presumption of Misuse

Under this misuse doctrine, the burden initially rests on the plaintiff to prove tortious interference under the seven *Restatement* factors. If the plaintiff proves tortious interference and the contract at issue is a EULA, then the defendant can bring a misuse defense: if the defendant proves that the end user could have breached the EULA independent of the defendant's actions, the court will find a presumption of misuse on the part of the plaintiff and bar the tortious interference claim. The court will presume, as a matter of law, that the plaintiff drafted the terms of the EULA to enforce against third parties, rather than end users.

If the defendant fails to prove the end user could have breached the EULA independent of the defendant's actions, the defendant may be liable for tortious interference. Liability still exists in all tortious interference cases with EULA claims against defendants where the end user could practically not have breached "but for" the defendant's conduct. This provides a safety valve for plaintiffs to use tortious interference as a model to enforce EULAs when she has no viable alternative cause of action or remedy at law.

2. Rebutting the Presumption: "Specific Targeting and Soliciting" and "No Other Use"

If the defendant successfully proves that the end user could have breached independent of the defendant's actions, the plaintiff can rebut the presumption of misuse (that it drafted the EULA terms with-

out intent to enforce them against the end users). To rebut the presumption, the plaintiff must provide evidence that the defendant targeted and solicited its end users to breach their EULAs *and* that there is no other use for the defendant's conduct, product, or service other than to help the end user breach. In other words, the defendant specifically targeted and solicited the parties to the plaintiff's contract. Once this proof is established, the plaintiff can successfully rebut the misuse presumption and assert tortious interference with a EULA. This provides a second safety valve for the use of tortious interference to enforce EULAs when the plaintiff has no other cause of action available because of the massive amount of end users it would need to sue to find a true remedy (and the defendant is actually at fault for the breach).

D. Application of the Proposed Misuse Doctrine

1. As Applied to MDY Industries, Inc.

The misuse doctrine allows the proper use of tortious interference with EULAs in the digital age. When WoW end users operate MDY Industries' Glider software to use bots in WoW, they breach their EULA with Blizzard Entertainment. As seen in the *MDY Industries* opinion, applying the seven *Restatement* factors finds MDY Industries liable for tortious interference.

MDY Industries might try to invoke the misuse doctrine by arguing that Blizzard Entertainment's end users could circumvent WoW security without the help of MDY Industries' Glider bot, and just happened to use Glider to do it. A successful circumvention might look like evidence provided by MDY Industries showing that the WoW end user who breached the particular EULA before the court happens to be a computer programmer capable of writing her own bot software. While possible, this scenario is unlikely to apply to all WoW users that breached the EULA and used bots.

Even if MDY Industries successfully invokes the misuse doctrine, Blizzard Entertainment can rebut the presumption of misuse by asserting that MDY Industries specifically solicits and targets WoW customers. MDY Industries' Glider website warning to WoW customers that using Glider breaches their contract with Blizzard Entertainment evidences such specific solicitation and targeting. MDY specifically made Glider to circumvent Warden and allow the use of bots in WoW software. The misuse doctrine does not prevent Blizzard Entertainment from bringing a tortious interference claim if there is no other use for Glider beyond providing bots for WoW users.

2. *As Applied to Lexmark*

Applying this to *Lexmark*, the burden of proof would rest on plaintiff Lexmark to prove tortious interference with their EULA. If Lexmark successfully proves that Static Control tortiously interfered with its EULA, then Static Control can invoke the misuse doctrine as a defense. To invoke the misuse doctrine, Static Control must show that its end users had the ability to breach without any help from Static Control. Here, Static Control successfully meets that burden because Lexmark's end users can use cartridges more than once or fail to return cartridges to Lexmark without the help of Static Control. For instance, the prebate terms do not prohibit Lexmark users from independently selling their used cartridge to another Lexmark customer. The end users *can* breach independently of Static Control's refill program. Therefore, the court would find misuse and presume as a matter of law that Lexmark drafted its prebate terms with no intent of ever enforcing them against its consumers.

Unless Lexmark can rebut the presumption of misuse by proving that Static Control specifically targeted and solicited Lexmark end users to breach the prebate agreement, the misuse doctrine would bar Lexmark's tortious interference claim. Lexmark will likely fail to rebut the presumption because Static Control provides other services to end users of other printer brands.¹⁰⁴ Static Control's refill program and microchips have uses beyond filling solely Lexmark cartridges, and unlike MDY Industries, Static Control has no website or other marketing material that specifically targets and solicits Lexmark customers. Therefore, the misuse doctrine would bar Lexmark from bringing a tortious interference claim.

3. *Potentially Problematic End User License Agreements*

As discussed in Section III.A., companies use EULAs to prevent end users from benchmark testing or reverse engineering their products, to regulate the resale of their products, and even to prohibit end users from review or criticism of their products or the companies themselves. The misuse doctrine addresses other possible misuses of EULAs that are struck down under the DMCA misuse model.¹⁰⁵ For instance, when an end user downloads NetBeans software created by Sun Microsystems, Inc. (Microsystems) and Oracle Corporation, she agrees to Microsystems' EULA that prohibits the publication or provision to any third party of any tests on or comparisons of the prod-

104. See Static Control Components, <http://www.scc-inc.com> (last visited Mar. 18, 2011).

105. See Loren, *supra* note 4, at 518 (discussing Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 203-04 (3d Cir. 2003)).

uct.¹⁰⁶ If the end user were to breach the agreement and post a review of NetBeans on Amazon.com, for example, tortious interference theoretically allows Microsystems to sue Amazon.com if Microsystems meets the *Restatement* test, which, as illustrated in this Note, is not difficult to do. Therefore, tortious interference currently allows Microsystems to control the content of Amazon.com without ever drafting a contract with Amazon.com.¹⁰⁷

If Microsystems proves that Amazon.com tortiously interfered with Microsystems' contract with Microsystems' end users, Amazon.com may invoke the misuse doctrine by asserting that Microsystems' end users can critique NetBeans anywhere they wish and just happened to post critiques on Amazon.com's website. The misuse doctrine prevents Microsystems from suing any party that runs a forum encouraging discussion about products because the end users' breach does not depend on any of the forums specifically. Under the proposed misuse doctrine, the court would presume, as a matter of law, that Microsystems drafted the terms of the EULA to enforce against third parties, never intending to enforce the terms against its end users.

Microsystems could then only win on tortious interference if it proves that Amazon.com specifically targeted and solicited the consumers to review NetBeans. Because Amazon.com sells many products and offers a forum for reviews of those products from many different manufacturers, it did not. There are many uses for Amazon.com beyond critiquing NetBeans. Therefore, Microsystems would fail to rebut a finding of misuse and the doctrine would bar Microsystems from a tortious interference claim to control the content of Amazon.com.

106. License Agreement for NetBeans with JavaFX (NB 6.9.1 / FX 1.3.1), Sun Microsystems, Inc. ("Sun") Software License Agreement § 5(f), https://cds.sun.com/is-bin/INTERSHOP.enfinity/WFS/CDS-CDS_Developer-Site/en_US/-/USD/ViewLicense-Start?LicenseUUID=PHGJ_hCwLwQAAAEqBzUMmzR.&ProductUUID=TK2J_hCwOHQAAAEq154MmzR_&cnum=&evsref=&sln= (last visited Mar. 18, 2011) ("You may not publish or provide the results of any benchmark or comparison tests run on Software to any third party without the prior written consent of Sun."). Professor Lydia Pallas Loren's research on end user agreements that expand copyright terms via contract law provides a similar example: the exclusive licensee of Disney's online movie trailers must agree to an EULA term prohibiting commentary that is "'derogatory to or critical of the entertainment industry or of [Disney] . . . or of any motion picture produced or distributed by [Disney].'" Loren, *supra* note 4, at 518 (quoting Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 203 (3d Cir. 2003)).

107. This may not succeed on tortious interference because the defendant, here Amazon.com, must know that there is a contract to be liable for tortious interference. This assumes that Amazon.com knows about the contract between Oracle and Oracle's end users.

E. Implications of the Proposed Misuse Doctrine

The misuse doctrine prevents companies from drafting EULAs to corner the market, as Lexmark did with its EULAs. It also prevents misuse by companies who draft contracts specifically to enforce against third party competitors and not actual contracting parties—because if the end user could independently breach the EULA, the doctrine bars a tortious interference claim. However, the misuse doctrine allows room for tortious interference when justified and necessary to protect contracts from meddling third parties, as in Blizzard Entertainment's use of tortious interference against MDY Industries. Finally, the misuse doctrine prevents companies like Sun Microsystems, Inc. from enforcing EULAs restricting review or criticism of their products.

Admittedly, this misuse theory is underinclusive because it leaves many cases where the end user can breach independently, but there is no practical remedy for the plaintiff other than tortious interference. While Lexmark still has a breach of contract claim at law against its many breaching end users, such claims do not provide a practical remedy at law because the expensive cost of litigation far outweighs recovering a few dollars worth of lost profit due to their unrealized prebate discount scheme; it also does not address the alienation of Lexmark customers should it bring a breach of EULA action against its end users directly.

However, the misuse doctrine prevents the potential misuse of tortious interference: the practice of drafting terms with no intent of ever enforcing them against the contracting party. It allows a tortious interference cause of action, a safety valve, where a contracting party has breached as a direct cause of the defendant's action (in many cases, where no practical remedy for the plaintiff exists beyond tortious interference).

VI. CONCLUSION

This Note examined tortious interference, its controversial history, and the new uses for tortious interference in the digital age. Through an overview of recent cases from the unlikely field of copyright law, we find that parties to copyright litigation are using tortious interference as a model to enforce end user license agreements. This is both genius and problematic. It is genius on the part of those bringing breach of end user license agreement claims because tortious interference grants companies a remedy at law when third parties induce end users to breach their end user agreement. It solves the problem posed by enormous litigation costs—not to mention public relations expenses—required to sue potentially thousands of end

users in the digital age.¹⁰⁸ However, tortious interference can also be misused in the digital age: it creates an incentive on the part of companies to write end user agreements without ever intending to enforce the terms against the end users themselves. Instead, these companies intend to enforce the terms against their competition. This is extremely questionable because it usurps the underlying philosophy of tortious interference and contract law; it also expands copyright terms beyond that intended by the DMCA. Ultimately, this Note suggests that tortious interference should be utilized as a new model to enforce end user license agreements. However, this Note also suggests limiting this new model's negative implications with a burden-shifting misuse doctrine, thus preserving tortious interference only where necessary to fill in the gaps of contract law.

While this Note limits its discussion of tortious interference misuse to EULAs in the digital age specifically, the theory could be applied on a broader scale to tortious interference generally. While the misuse doctrine does not address some of the perceived inconsistencies between tortious interference and traditional contract law, like efficient breach, it redefines and narrows the vague standard of liability that haunts tortious interference. It could prevent the enforcement of contractual terms against third parties who never bargained for them and could narrow the forever poorly defined scope of tortious interference liability to one requiring targeting and soliciting of the breaching party. The misuse doctrine could preserve and promote the truly heroic safety valve function of tortious interference beyond the EULA context while simultaneously limiting its less admirable attributes to preserve the integrity of contract law.

108. See Gomulkiewicz, *supra* note 8.